S & M Shopping Arcade Sdn Bhd & Ors v Fui-Lian Kwong Hing Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–3–86 OF 2005
ABDUL MALIK ISHAK J
3 FEBRUARY 2006

Landlord and Tenant — Lease — Sub lease — Determination — Unless orders — Whether the first plaintiff is estopped from denying to make arrangements to effect delivery of vacant possession to the defendant and continuing to pay the last rental to the defendant having made before the court a solicitor undertaking to do the same — Whether there was consent order

The first plaintiff is a sub-lessee of the defendant. The second to the seventh plaintiffs are sureties of the first plaintiff's obligations. The parties relationship coupled with their respective duties and obligations are set out in the sub-lease and guarantee agreement. Arising from what the defendant contends to be the fundamental breaches by the first plaintiff of the said sub-lease and guarantee agreement, the defendant gave notice to the first plaintiff treating the same to be discharged and at an end requiring delivery of vacant possession of the demised premises and the first plaintiff, whilst disputing the defendant's allegations of breaches, accepted the said termination but at the same time sought to deliver vacant possession of the demised premises to the defendant 'within a period of three months from the date hereof …'. The plaintiffs in its first affidavit indicated that it would require three months to relocate its existing tenants and make arrangements to effect delivery of vacant possession to the defendant and would therefore continue to pay the last rental to the defendant. In view of that, a consent order was recorded before the court on 14 March 2005. The defendant sought for 'unless orders' pursuant to the provisions of O 92 r 4 of the Rules of the High Court 1980 that the plaintiffs within seven days from the date of the making of the order sought herein make compliance with the consent order of 14 March 2005.

Held, allowing the application:

(1) What resulted from 14 March 2005 was a consent order. An undertaking by any counsel should not be taken lightly. The court has the inherent jurisdiction, to entertain an application by any person to whom the counsel has given his undertaking as a counsel, to exercise its summary procedure to compel the counsel to carry out the undertaking even though the applicant is not the client of the counsel (see para 10).

(2) It was grossly unfair for the first plaintiff to continue to occupy the demised premises rent free for all this period of time. More than four have elapsed since

14 March 2005 and the first plaintiff continued to occupy the demised premises well beyond the 'three months grace period' that it had unilaterally provided. Yet it has not paid a single cent to the defendant. There was no issue of insufficient time having been afforded to the plaintiffs to comply (see para 20).

[Bahasa Malaysia summary

Plantif pertama adalah pemajak kecil defendan. Plaintif kedua sehingga ketujuh adalah penjamin kepada obligasi plaintif pertama. Pertalian parti-parti bersama dengan tugas dan obligasi masing-masing adalah terbentang didalam pemajakan dan jaminan perjanjian. Timbul daripada apa yang defendan menegaskan tentang asas pengingkaran oleh plaintif pertama berkenaan dengan pemajakan dan jaminan perjanjian, defendan telah memberikan notis kepada plaintif pertama di mana yang sama telah dilepaskan dan memerlukan penyerahan milikan kosong harta demis dan juga plaintif sementara mempertikaikan allegasi-allegasi defendan tentang pengingkaran telah menerima pembatalan tersebut tetapi pada masa yang sama telah menyerahkan milikan kosong harta demis kepada defendan dalam masa tiga bulan daripada tarikh tersebut. Plaintif-plainitf didalam afidavit pertamanya menunjukkan bahawa ia memerlukan tiga bulan untuk menempatkan semula penyewa yang masih ada dan membuat pengaturan/penyusunan untuk membolehkan penyerahan milikan kosong kepada defendan dan oleh itu akan terus membayar sewa yang terakhir kepada defendan. Dalam hal ini, satu persetujuan penghakiman telah direkodkan di hadapan mahkamah pada 14 Mac 2005. Defendan seeks for 'unless orders' berikutan peruntukan-peruntukan A 92 k 4 Kaedah-kaedah Mahkamah Tinggi 1980 bahawa plaintif-plaintif dalam masa 7 hari dari tarikh pembuatan peintah yang mana mematuhi persetujuan perintah bertarikh 14 Mac 2005.

Diputuskan, membenarkan permohonan tersebut:

(1) Apa yang timbul daripada 14 Mac 2005 adalah satu persetujuan perintah. Satu akujanji oleh peguam tidak patut diambil ringan. Mahkamah mempunyai budi bicara yang sedia ada untuk melayani satu permohonan oleh seseorang yang mana peguam telah memberi akujanjinya sebagai peguam untuk menggunakan prosedur summarinya bagi memaksa peguam tersebut untuk melaksanakan akujanjinya walaupun pemohon bukan merupakan pelanggan kepada peguam tersebut (lihat perenggan 10).

(2) Adalah tidak adil bagi plaintif pertama untuk terus mendiami harta demis, dimana, sewa adalah percuma bagi tempoh masa ini. Lebih daripada empat bulan sudah berlepas semenjak 14 Mac 2005 dan plaintif pertama telah mendiami harta demis melebihi tiga bulan tempoh tangguh yang telah diperuntukkan. Malah, plaintif pertama masih belum membayar sebarang sen kepada defendan. Tiada sebarang isu dimana masa adalah tidak mencukupi kepada plaintif untuk dipatuhi (lihat perenggan 20).]

Notes

For cases on leases on tenancy, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1115–1117.

Cases referred to

Balogh v Crown Court at St Albans [1975] QB 73 (refd)
Folin & Brothers Sdn Bhd v Wong Foh Ling & Ors (No 2) [2001] 2 MLJ 23 (refd)
Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 (refd)
Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936 (refd)
L & Birm, Ry v Grand Junction Canal Co (1835) 1 Ry Ca 224 (refd)
Palm Breeze Sdn Bhd v Ho Hup Construction Co Bhd [1998] 4 MLJ 674 (refd)
Public Finance Bhd v Natcom Development Sdn Bhd & Ors [1996] 2 MLJ 657 (refd)
Purcell v FC Trigell Ltd [1971] 1 QB 358 (refd)
Milburn v Newton Colliery Ltd (1908) 52 SJ 317 (refd)
Neath Canal Co v Ynisarwed Resolven Coll Co (1875) LR 10 Ch 450 (refd)
Northern Counties Securities Ltd v Jackson and Steeple Ltd [1974] 2 All ER 625 (refd)
Reece v McKenna, ex p Reece (1953) QSR 258 (refd)
S & M Shopping Arcade Sdn Bhd v Fui Lian Kwong Hing Sdn Bhd [2003] 3 CLJ 58 (refd)
Stumore v Campbell & Co (1892) 1 QB 314 (refd)
United Mining and Finance Corporation Ltd v Becher [1910] 2 KB 296 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1)(b)
Rules of the High Court 1980 O 22A, O 25 r 1, O 27 r 3, O 34 r 8, O 92 r 4

Gideon Tan (Lee Noushi with him) (Gideon Tan Razali Zaini) for the plaintiffs.
Michael KT Chow (Goh Keng Tat with him) (Logan Sabapathy & Co) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] This is the second judgment involving the first plaintiff and the defendant. The first judgment has since been reported vide *S & M Shopping Arcade Sdn Bhd v Fui Lian Kwong Hing Sdn Bhd* [2003] 3 CLJ 58. Without further ado, I will now proceed to the heart of the matter.

[2] By way of a summons in chambers in encl 10, the defendant seeks for the following orders pursuant to the provisions of O 92 r 4 of the Rules of the High Court 1980 ('RHC'):

(1) the plaintiffs shall within seven days from the date of the making of the order sought herein make compliance with the consent order of 14 March 2005 by:

(a) effecting payment of the sum of RM918,000 to the defendant; and

A (b) continuing to pay the sum of RM306,000 on or before the seventh day of each subsequent month begining April 2005 until such time that vacant possession of the demised property has been delivered to the defendant in accordance with the terms of the sub-lease agreement;

(2) in the event that the plaintiffs shall in anyway fail to make or ensure compliance is made with the provisions set out in prayer one above before the final disposal of the plaintiffs' originating summons dated 24 February 2005 filed herein, then the said originating summons shall upon such default stand automatically dismissed with costs;

(3) such further and/or other orders or directions be made or given as this honourable court deems just in the circumstances;

C (4) the costs of and occasioned by this application be paid by the plaintiffs to the defendants.

[3] The grounds of the application are set out in the affidavit affirmed by Lim Fap Khoon on 29 March 2005 filed herein as seen in encl 9 and they may be stated, inter alia, in these salient words:

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(a) the plaintiffs had in its first affidavit affirmed on 24 February 2005 indicated that it would require three months to relocate its existing tenants and make arrangements to effect delivery of vacant possession to the defendant and would therefore continue to pay the last rental to the defendant;

E (b) in view of the aforesaid, a consent order was recorded before this honourable court on 14 March 2005 with regard to the same;

(c) notwithstanding the said consent order and a subsequent request for payment issued by the defendant through its solicitors, no payment or response has been forthcoming from the plaintiffs.

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[4] Enclosure 10 raises a short but important point about how parties to litigation should conduct themselves in the face of an express undertaking given to the court which undertaking then results in a consensual order being recorded in court.

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[5] It is onerous on the part of anyone to give an undertaking to the court. It has often been said that an undertaking given to the court is equivalent to an injunction and its breach may be punished in the same way as the breach of an injunction (*L & Birm, Ry v Grand Junction Canal Co* (1835) 1 Ry Ca 224, *Neath Canal Co v Ynisarwed Resolven Coll Co* (1875) LR 10 Ch 450, *Milburn v Newton Colliery, Ltd* (1908) 52 SJ 317, and *Northern Counties Securities Ltd v Jackson and Steeple Ltd* [1974] 2 All ER 625).

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CONSENSUAL UNDERTAKING OF 14 MARCH 2005

I **[6]** On 14 March 2005, when the parties appeared before this court on the first return date for encl one, the following consensual undertaking was recorded:

(a) that the first plaintiff shall continue to pay the last rental of RM306,000 to the defendant for the period of its occupation until delivery of vacant possession of the demised property to the defendant; and

(b) that such payment shall be without prejudice to the defendant's right to claim double rental for the period in question.

[7] It would be ideal to set out the following brief objective facts forming the background of the entire action by the plaintiffs, in general, and the consensual undertaking recorded on 14 March 2005, in particular. I shall do just that:

(a) the first plaintiff is a sub-lessee of the defendant of the well-known shopping arcade located around Jalan Petaling known as S & M Shopping Arcade. The second to the seventh plaintiffs are sureties of the first plaintiff's obligations. The parties relationship coupled with their respective duties and obligations are set out in the sub-lease & guarantee agreement dated 15 October 1992 as reflected in exh 'WSL-1' of encl 2;

(b) arising from what the defendant contends to be the fundamental breaches by the first plaintiff of the said sub-lease & guarantee agreement, the defendant by letter dated 7 February 2005 gave notice to the first plaintiff treating the same to be discharged and at an end requiring delivery of vacant possession of the demised premises and that very letter can be seen in exh 'WSL-2' of encl 2 (according to the case of *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 1 WLR 1468, p 1470 that a fundamental term 'underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates'; a fundamental term is also said to be the 'core' of the contract (*Melville* (1956) 19 MLR 26) and 'however extensive the exception clauses may be, it has no application if there has been a breach of a fundamental term' (*Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936); and

(c) the first plaintiff, whilst disputing the defendant's allegations of breaches, accepted the said termination but at the same time sought to deliver vacant possession of the demised premises to the defendant 'within a period of three months from the date hereof …' namely 21 February 2005 being the date of the plaintiffs' solicitors letter to the defendant which is to be found in exh 'WS–5' in encl 2.

[8] It was highlighted to this court on 14 March 2005 by way of para 19 of encl 2 that the plaintiffs, particularly the first plaintiff, affirmed their commitment to pay the rental to the defendant during the period of its occupation of the demised premises leading up to the 'promised' handing over of vacant possession of the demised premises to the defendant within the supposed 'three months period'. For ease of reference, para 19 of encl 2 is worded in this way:

> The first plaintiff will continue to pay rentals to the defendant for the three months grace period.

[9] It is germane to mention that quite apart that the first plaintiff had failed to pay any rentals to the defendant since 24 January 2005, the so-called 'three months grace period' has come and gone and yet the first plaintiff continues to occupy the demised premises with no indication of handing over vacant possession to the defendant. So much for the first plaintiff's credibility and credence.

A WHAT IS THE EFFECT OF THE CONSENSUAL UNDERTAKING DATED 14 MARCH 2005?

[10] It is quite apparent that para 19 of encl 2 as reproduced above constitutes a clear and affirmative statement made to this court. This very statement is augmented B by the undertaking given by counsel for the plaintiff on 14 March 2005 leading to the recording of the consensual undertaking. In effect, what resulted from that day was a consent order. An undertaking by any counsel should not be taken lightly. The court certainly has the inherent jurisdiction to entertain an application by any person to whom the counsel has given his undertaking as a counsel, to exercise its C summary procedure to compel the counsel to carry out the undertaking even though the applicant is not the client of the counsel (*United Mining and Finance Corporation, Ltd v Becher* (1910) 2 KB 296; and *Coleman v Coleman* (1920) P 71).

[11] In relation to the consent order, I have this to say. It is trite law that such a consent order must be given its full effect even if it relates to an interlocutory step in D the present proceedings. *Halsbury's Laws of England* (4th Ed), Vol 39 at p 286 carries the following write-ups, germane to the occasion at hand:

> 390. Effect of consent judgment or order. A consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the E command of the court (*Wentworth v Bullen* (1829) 8 B&C 840 at p 850, per Parke B; *Lievesley v Gilmore* (1866) LR 1 CP 570; *Conolan v Leyland* (1884) 27 Ch D 632.), and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order (*Mullins v Howell* (1879) 11 Ch D 763, CA; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* (1895) 2 Ch 273, CA; *Purcell v FC Trigell Ltd* at pp 366–367,.). A consent order must be given its full contractual effect, F even if it relates to an interlocutory step in the action (*Purcell v FC Trigell Ltd* [1971] 1 QB 358; [1970] 3 All ER 671, CA. See also *Goring v Lloyd* (1887) 3 TLR 455, CA; *Intervale Group of Companies Ltd v Knighton* (1976) Bar Library Transcript 302).

THE SUMMONS IN CHAMBERS IN ENCL 10

G **[12]** The orders that the defendant seek in encl 10 are commonly known as the 'unless orders'. Such an order is commonly issued to ensure compliance by the parties to the proceedings to the directions and orders of the court.

[13] It is ideal to refer to the English Practice Direction which although strictly not H applicable in Malaysia would indirectly provide a useful illustration of the operation and drafting of the 'unless orders'. Under the English Practice Direction, an 'unless order' would apply particularly to consent order. In this connection, reference should be made to the English Court of Appeal's case of *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 where Auld LJ writing a separate I judgment aptly said at p 1677 of the report:

> As Beldam LJ observed in *RG Carter (West Norfolk) Ltd v Ham Gray Associates Ltd* (unreported), 21 June 1996; Court of Appeal (Civil Division) Transcript No 922 of 1996, it is wrong to regard guidelines such as this as a statutory formula. He and Leggatt LJ demonstrated that approach two years before, in *Caribbean General Insurance Ltd v Frizzell*

Insurance Brokers Ltd. (1994) 2 Lloyd's Rep 32. There, Leggatt LJ, in a passage immediately following the references to the *Jokai case* [1992] 1 WLR 1196 and *Costellow v Somerset County Council* (1993) 1 WL.R 256 read by Ward LJ, continued with these words, at p 40:

> Those approaches indicate the need for a defaulter, if he is to escape the consequences of failure to comply with a peremptory order, to show that in the circumstances the relevant breach was excusable if not unavoidable.

Beldam LJ on the same page of the *Frizzell* case, in a passage similar to that cited by Ward LJ from his judgment in the *Carter* case, said:

> Final, peremptory or 'unless' orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order, and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case, and the failure of the party to comply with the order is inexcusable.

Neill LJ areed with both judgments in that case. I respectfully agree with him, Leggatt and Beldam LJ that the essential notion in play is whether a party's failure to comply with an order is inexcusable, in the sense of being without a reasonable excuse.

[14] In *Folin & Brothers Sdn Bhd v Wong Foh Ling & Ors (No 2)* [2001] 2 MLJ 23, I had occasion to consider the case of *Hytec Information Systems Ltd v Coventry City Council* and this was what I said at pp 480–481 of the report):

> To me an 'unless' order would spell out the consequences of the failure to comply with its terms, and any disobedience to such an order is likely to be held to be contumelious behaviour which would result in the dismissal of the action or the striking out of the defence and in the event it gives rise to a dismissal of the action, it may prevent the plaintiff from issuing a second writ even though the period of limitation has not expired. Ward LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, p 1674 spoke of the 'unless' order in these fine words:
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> > (1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the order that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two plights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

I repeat the order of the court dated 9 June 1999 was not in the nature of an 'unless' order. Even if it was in the nature of an 'unless' order, the court has the inherent power and the discretion to ascertain whether the failure to comply with the 'unless' order was indeed

'intentional and contumelious'. If authority is needed for this sound approach, I can do no better than to rely on the speech of Sir Nicolas Browne-Wilkinson VC in the case of *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196, CA where at p 1203A-B, the Vice Chancellor succinctly said:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an 'unless' order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

Since the order of the court dated 9 June 1999 was a 'bare' order following closely the summons-for-directions routine under O 25 r 1 of the RHC, this court would certainly look with askance at the application in encl 107. There was no basis at all for the plaintiff to strike out the defences of the second, third, fifth, sixth, seventh, eighth to the eleventh defendants nor was there a basis for judgment to be entered against them under O 24 r 16(1) of the RHC. It was a grave error in procedure when the plaintiff filed encl 107 purportedly on the strength of the order of the court dated 9 June 1999. There was no provision at all in the order of 9 June 1999 as to what should occur in the event of a default – that order was not in the nature of an 'unless' order.

[15] The plaintiffs argued that the 'unless orders' are only available for procedural defaults. Such an argument is plainly incorrect and is not supported by any case law or principle. Admittedly, most of the cases dealing with the 'unless orders' concerned procedural defaults. But that would only demonstrate a facet of the application of the principle rather than define the ambit of the principle. The case of *Palm Breeze Sdn Bhd v Ho Hup Construction Co Bhd* [1998] 4 MLJ 674 correctly defines the circumstances when an 'unless order' will be made. Perhaps the true ambit of the 'unless order' can be distilled from the unreported decision of the English Court of Appeal case of *Bibby Commercial Finance Limited v Fresco (UK) Limited and Martin P Ridsdale* [1997] EWCA Civ 2868 (1st December, 1997) and it is obtainable through the internet vide *http://www.bailii.org/ew/cases/EWCA/Civ/1997/2868.html*. In that case, the defendants there who had a counterclaim against the plaintiff and an added party obtained an injunction to restrain the latter from interfering with their business. Subsequently, the parties recorded a consent order for the payment into court by the defendants there a certain amount of money and in exchange the defendants there would be released from the undertaking as to damages given in exchange for the said injunction. The defendants there then sought to discharge the said injunction and, in the meantime, partly on account of such an application, the defendants there defaulted on the payments payable under the said consent order. In view of the default by the defendants there, the plaintiff successfully applied to the English High Court for an 'unless order' in relation to the payment of the said money. The application by the defendants there for leave to appeal against the granting of the 'unless order' was refused by the English Court of Appeal. Robert Walker LJ in his judgment and speaking for the English Court of Appeal emphasised that the said consent order had an independent existence of its own which would survive the discharge of the injunction by the defendants there. The argument to the contrary by the defendants there was described by his Lordship as having the 'virtue

of boldness'. Having regard to the principle as set out in the case of *Purcell v FC Trigell Ltd* (1971) 1 QB 358, his Lordship held that the consent order essentially embodied the bargain between the parties that should be enforced by the court. A

[16] Likewise here, the consensual undertaking of 14 March 2005 had an independent existence embodying the bargain between the parties that should be enforced by this court. No where was there an attempt by the plaintiffs to explain why they have so brazenly acted contrary to the averment at para 19 of encl 2 which was reproduced earlier. B

[17] Not only that, the plaintiffs too ignored the undertaking recorded through counsel in court on 14 March 2005. Oh, what a pity! What a shame! C

[18] As set out above, the plaintiffs in their affidavit in encl 2 have made a clear representation to the defendant and to this court that it would pay the monthly rentals. It is trite law that such a statement in the affidavit must be construed to be the truth and must not be misleading. Hobhouse J in the *Nordglimt (1988) 2 ALL ER 531* adversely commented on the untrue statements that were made in the affidavit and I share his Lordship's views. At p 535 of the report, this was what his Lordship said: D

> The ground which the defendants chose to characterise as non-disclosure was probably more accurately described as one of misstatement. The affidavit to lead the warrant for arrest made inaccurate statements of fact which ought to have been known to be inaccurate. If their inaccuracy had been disclosed to the court then, unless additional facts had also been disclosed, the warrant would have been refused. However it is accepted by both parties before me that if the true facts had been relied on, that is to say if the genuine bill of lading had been referred to and the actual quantity of goods shipped had been stated, then there would be nothing wrong with the affidavit and (subject to the other grounds) there would have been no reason for the court to refuse to issue the warrant of arrest or for the defendants or any other interested party to object to it. Therefore, as regards the issues between the parties, the distinction between the false and genuine bills of lading was academic and I am told, and accept, that no one in the Belgian proceedings has ever troubled to draw any distinction between the two. However, the fact remains that an untrue statement has been made to the court in an affidavit and that affidavit has been produced as a genuine document which is in truth false. E F G
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> I consider that it must be stated, and stated clearly and unequivocally, that where any person finds that he has made a false statement in an affidavit, albeit mistakenly, it is his duty to correct it and to do so promptly and frankly. In the present case that did not occur. The acknowledgment of the error was only made in a later affidavit, after the issue of the present summons and in a fashion that can at best be described as half-hearted. It is of the greatest importance to the administration of justice that courts should be able to rely on the truthfulness and accuracy of affidavits sworn by solicitors or their employees. It is accordingly essential that such affidavits should be prepared with proper care and that mistakes of the kind which I have described should not occur. It is also essential that lawyers acting for parties and in particular the deponents of such affidavits should attach the greatest importance to their oath and that when they find that they have made a false statement on oath they should be at pains to correct it. Happily what has occurred in the present case is in my experience most unusual but, having occurred, it must be made the subject of comment by the court. H I

[19] Indeed affidavit plays a major role in dispensing justice. It constitutes evidence on which the court can determine the issue and make an order or give a judgment accordingly. Affidavits may even contain admissions upon which the parties may apply to enter judgment by virtue of O 27 r 3 of the RHC. If not for the representation made by the plaintiffs in the affidavit in encl 2 and, more importantly, the consensual undertaking of 14 March 2005, the defendant would have been entitled to make an application for the interim payments under O 22A of the RHC.

[20] More than four months have elapsed since 14 March 2005 and the first plaintiff continues to occupy the demised premises well beyond the 'three months grace period' that it had unilaterally provided. Yet it has not paid a single cent to the defendant. There is no issue of insufficient time having been afforded to the plaintiffs to comply. One can only surmise that the plaintiffs, especially the first plaintiff, is acting in total disregard of the authority of this court. Whatever that had transpired on 14 March 2005 should not be rendered nugatory or ineffective. To achieve this objective and to show that this court should be respected, by all and sundry, the prayers in encl 10 should be acceded to.

OTHER ANCILLARY ISSUES RAISED BY THE PLAINTIFFS

[21] In my considered view, the merits of the plaintiffs' originating summons predicated on their allegations of the defendant's unlawful unilateral termination of the lease agreement and the refund of the deposit to the first plaintiff are not issues that should be considered in adjudicating the summons in chambers in encl 10. Similarly, any mention of set-off of the deposit of the lease should not be considered at this point of time. As much as the plaintiffs may speculate that the deposit held by the defendant would purportedly be sufficient to cover any outstanding rentals, the defendant too can equally contend that if it were to succeed, the damages, given the duration of the sub-lease, will be in excess of the deposit.

[22] All these salient and interesting issues would be considered and decided at the stage of the hearing of the originating summons. But in order for the plaintiffs to seek the indulgence of this court to proceed to the stage of the hearing of the originating summons, the plaintiffs should first conduct themselves in an orderly manner according to due respect and the dignity and authority of this court. The courts may be lenient to litigants who conduct their own cases but all advocates and solicitors are expected to respect the dignity and authority of the court and to behave responsibly and with full decorum. That doesn't mean that the un-represented litigants should disrespect the court when conducting their own cases. I venture to say that all litigants whether they are represented by counsel or otherwise must accord respect to the dignity and authority of this court. As Bayley J., aptly said in *R v Davison* (1821) 4B & Ald 329 at p 336:

> every man who comes into a Court of Justice either as a defendant or otherwise, must know that decency is to be observed there, that respect is to be paid to the judge, and that, in endeavouring to defend himself from any particular charge, he must not commit a new offence.

[23] There are certainly limits to judicial tolerance. Judicial sensitivity will vary from judge to judge and from time to time and from place to place. Judges are mere mortals. They are mere human beings and their judicial tolerance threshold are quite normal, as normal as another human being. It is certainly wise to heed any warnings from the Bench. And what I am saying now must be taken as a warning to the litigants and their counsel. Philip J, in *Reece v McKenna, ex p Reece* (1953) QSR 258 at p 264 rightly said that:

> To impute injustice to a justice is to insult him in respect of the very title he wears; it is like imputing blindness to a bishop.

[24] The purported analogy of a counterclaim does not assist the plaintiffs at all. In the scenario postulated by the plaintiffs, there is no question of the defendant enforcing its judgment in the counterclaim running parallel with the plaintiffs original claim. It must be borne in mind that if the defendant seeks to enforce its judgment in the counterclaim, the plaintiffs are at liberty to apply for a stay of execution pending the disposal of its original claim. And according to *Stumore v Campbell & Co* (1892) 1 QB 314, at p 317 that execution in such a case is only issued for the balance and in favour of the one who has the balance. But, presently, this court is not concerned with the issue pertaining to the stay of execution. However, if, for example the defendant had prayed for interim payments under O 22A of the RHC in respect of the outstanding rentals then the existence of a potential cross-claim would have to be taken into consideration by this court in order to determine the amount of the interim payment. What I have here is the consensual undertaking of 14 March 2005 recorded in this court which was offered in unqualified terms. It must be borne in mind that being consensual in nature, no appeal may be brought to the Court of Appeal against such an undertaking pursuant to s 68(1)(b) of the Courts of Judicature Act 1964. At any rate, the case of *Public Finance Bhd v Natcom Development Sdn Bhd & Ors* [1996] 2 MLJ 657, FC, can be distinguished on the simple basis that it concerned the old O 34 r 8 of the RHC on setting an action down for trial. That case, with respect, has nothing to do with an 'unless order' situation.

CONCLUSION

[25] The plaintiffs cannot pretend as if nothing transpired in court on 14 March 2005. The plaintiffs too cannot pretend that no representation to the court had been made in regard to the payment of rentals during the period of its occupation bearing in mind that such a representation had been set out in the affidavit in encl 2 and was expressly repeated to this court on 14 March 2005.

[26] In my judgment, what crystallised on 14 March 2005 was a consent order. In the words of Lord Denning MR in *Purcell v FC Trigell Ltd* [1971] 1 QB 358, CA, at p 364 of the report:

> But there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside.

A **[27]** In my judgment, it is grossly unfair for the first plaintiff to continue to occupy the demised premises rent free for all this period of time. It must be emphasised that we are now beyond the so called three months grace period which the first plaintiff had boasted it will require in order to move out. Yet, sadly, the first plaintiff continues to occupy the demised premises without paying rental to the great detriment of the unhappy defendant.

B

[28] An important issue had been adjudicated here. It is whether a solemn undertaking to this court carries any weight at all. I will answer it in the positive in the context of the contempt power of this court which is both salutary and dangerous. In the words of Stephenson LJ in *Balogh v Crown Court at St Albans* [1975] QB 73 at p 91, it is:

C

> … salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of safeguards considered generally necessary to secure justice for him.

D

[29] It is also frightening in the sense that the contemnor may be imprisoned for a specific duration of time. George Bernard Shaw in *Man and Superman, Maxims for Revolutions* once said:

> While we have prisons, it matters little which of us occupy the cells.

E

[30] For all these reasons, I must grant an order in terms of the defendant's application in encl 10.

F *Order in terms.*

Reported by Peter Ling

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H

I